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No. 87-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE H. KASPER, JR.,

Petitioner,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

JEFFERSON D. KIRBY, III
Counsel of Record
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for Federal National Mortgage Association

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVA

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether claims never raised by the Petitioner in the Courts below, such as those relating to an alleged breach of contract, a supposed violation of due process, and related matters, can properly be included in a petition for a writ of certiorari.

2. Whether the Federal National Mortgage Association Charter Act provides a private cause of action by an employee claiming to have been wrongfully discharged from his employment.

3. Whether the 180-day period within which a charge of discrimination is to be filed with the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act, 29 U.S.C. Section 626(d)(1), begins to run at the time that an employee is notified of his termination.

4. Whether requests initiated by an employee to be transferred or reassigned to another position after that employee has been notified of his termination toll the 180-day period for filing a charge of employment discrimination with the Equal Employment Opportunity Commission.

ILABLE COPY

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.[1]

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[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Federal National Mortgage Association: None.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Federal National Mortgage Association ("FNMA"), respectfully urges denial of the petition for a writ of certiorari to review the judgment and order entered by the United States Court of Appeals for the Eleventh Circuit on August 3, 1987.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Certain provisions of the Federal National Mortgage Association Charter Act ("FNMA Charter Act"), 12 U.S.C. §§ 1716-1723h, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, are involved in this case. In particular, 12 U.S.C. § 1723a(d)(2) provides that:

> The board of directors of the corporation shall have the power to select and appoint or employ such officers, attorneys, employees, and agents, to vest them with such powers and duties, and to fix and to cause the corporation to pay such compensation to them for their services, as it may determine; and any such action shall be without regard to the Federal civil service and classification laws. Appointments, promotions, and separations so made shall be based on merit and efficiency, and no political tests or qualifications shall be permitted or given consideration. Each officer and employee of the corporation who is employed by the corporation prior to January 31, 1972, and who on the day previous to the beginning of such employment will have been subject to the civil service retirement law (subch. III of ch. 83 of Title 5) shall, so long as his employment by the corporation continues without a break in continuity of service, continue to be subject to such law; and for the purpose of such law his employment by the corporation without a break in continuity of service shall be deemed to be employment by the Government of the United States. The corporation

shall contribute to the Civil Service Retirement and Disability Fund a sum as provided by section 8334(a) of Title 5, except that such sum shall be determined by applying to the total basic pay (as defined in section 8331(3) of Title 5 and except as hereinafter provided) paid to the employees of the corporation who are covered by the civil service retirement law, the per centum rate determined annually by the Director of the Office of Personnel Management to be the excess of the total normal cost per centum rate of the civil service retirement system over the employee deduction rate specified in section 8834(a) of Title 5. The corporation shall also pay into the Civil Service Retirement and Disability Fund such portion of the cost of administration of the fund as is determined by the Director of the Office of Personnel Management to be attributable to its employees. Notwithstanding the foregoing provisions, there shall not be considered for the purposes of the civil service retirement law that portion of the basic pay in any one year of any officer or employee of the corporation which exceeds the basic pay provided for positions listed in section 5312 of Title 5 on the last day of such year: *Provided,* That with respect to any person whose employment is made subject to the civil service retirement law by section 806 of the Housing and Community Development Act of 1974, there shall not be considered for the purposes of such law that portion of his basic pay in any one year which exceeds the basic pay provided for positions

> listed in section 5316 of such Title 5 on the last day of such year. Except as provided in this subsection, the corporation shall not be subject to the provisions of Title 5.

29 U.S.C. §626(d) specifies that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

STATEMENT OF THE CASE

I. The Relevant Facts

George H. Kasper, Jr. began working for FNMA's predecessor, an agency of the United States Govern-

ment also known as the Federal National Mortgage Association, in December, 1965. The name of that agency was changed to the Government National Mortgage Association ("GNMA") during a reorganization in which the private entity, FNMA, was created on September 1, 1968. 12 U.S.C. §§ 1717(a), 1718(a). Kasper resigned from GNMA effective November 30, 1968, to join FNMA.

Kasper, who had been practicing law since 1949, was initially employed by FNMA as Assistant Regional Counsel. In May, 1977, he was appointed Regional Counsel for FNMA's Southeastern Region, the position that he held until the time of his termination. At the time that his employment with FNMA was terminated, Kasper was almost 57 years old.

On July 22, 1982, Glenn T. Austin, Jr., the Regional Vice-President for FNMA's Southeastern Region, asked Kasper to come to his office and, after closing the door, told him, "Mr. Kasper, your services are no longer required." Austin was "as gentlemanly as he possibly could be under the circumstances," and he asked Kasper to contact Al Burfeind, FNMA's Vice-President for Personnel and Administration, in Washington, D.C. Kasper informed his staff that afternoon of his departure, and he cleaned out his office by noon of the next day. At no time thereafter did Kasper perform any services for FNMA.

As a result of his conversations with Burfeind, Kasper was credited with 19 years of service and 6 months of severance pay. Instead of paying the severance benefits in a lump-sum, Burfeind offered to extend the payments for an entire year so that Kasper would be considered to have 20 years of service for retirement purposes. Burfeind prepared and sent

Kasper an August 4, 1982 memorandum, stating that Kasper would "be continued in FNMA employment from August 8, 1982 through August 5, 1983, at which time he will retire under the discontinued service provisions of the Civil Service Retirement System (immediate entitlement)." The August 4, 1982 memorandum further detailed that Kasper was to receive his full salary until August 7, 1982, when his income would be reduced on a quarterly basis until his retirement on August 5, 1983. He was to continue receiving fringe benefits except for leave based on his full salary rate, and he was to receive accrued vacation pay with his final salary check upon his retirement in 1983. Except for minor adjustments requested by Kasper, he was paid in accordance with the terms of the August 4, 1982 memorandum.

Kasper claims to have asked Burfeind to look into the possibility of a transfer or a reassignment to another position within FNMA. At no time during any of their conversations did Burfeind initiate any discussion concerning the possibility of a transfer, nor did he ever indicate that such a position might be available. Rather, in response to Kasper's requests to be considered for another job in the organization, Burfeind supposedly said he would check into it. Kasper never sent a formal request for a transfer to anyone with FNMA, nor did anyone at FNMA instruct him not to seek other employment.

On the contrary, during the summer of 1982, Kasper contacted Howard S. Carnes, the former Regional Vice-President for FNMA's Southeastern Region, and James Murray, the President of FNMA, and requested that they prepare letters of recommendation

for him to use with other prospective employers. Both of them prepared and sent appropriate letters to him.

In late 1982, sometime between October and December, Kasper was introduced to his replacement, Judy Dedmon, the new Regional Counsel for FNMA's Southeastern Region. At that time, Dedmon was 31 years old.

On March 11, 1983, as a result of attending a seminar on employment discrimination conducted by the American Bar Association, Kasper decided that his age was the reason that FNMA had dismissed him. He wrote to Oakley Hunter, the former President of FNMA and a member of FNMA's Board of Directors, on March 26, 1983, claiming that his discharge was unwarranted and requesting additional separation benefits.

Shortly thereafter, in mid-April, 1983, Kasper began working as an hourly-paid consultant for Federated Financial Corporation. On May 1, 1983, he became a full-time employee of Federated Financial.

In the meantime, however, Kasper continued to seek additional severance benefits from FNMA. In June, 1983, he wrote to David Maxwell, Chairman of the FNMA Board of Directors, claiming to have statistical evidence of discrimination and accusing FNMA of corporate wrongdoing. Caryl Bernstein, FNMA's Executive Vice-President, General Counsel and Secretary, contacted Kasper in response to that letter in July, 1983, and Kasper advised her that he wanted a full year's severance pay as well as additional benefits.

By letter dated August 5, 1983, FNMA rejected Kasper's demands and reconfirmed its intention to

adhere to the arrangements set forth in the August 4, 1982 memorandum. Kasper's "discontinued service retirement" was effective August 5, 1983, and he has been receiving retirement payments since that time in accordance with the terms of the memorandum.

On August 24, 1983, 398 days after he was informed of his termination, Kasper filed a charge of age discrimination with the Equal Employment Opportunity Commission. In that charge, Kasper alleged that he had been involuntarily retired from his Regional Counsel position on August 12, 1983.

I. The Proceedings Below

On November 15, 1983, Kasper sought leave to intervene in an action filed by another former employee, Walter Calhoun, against FNMA under the ADEA and related statutes then pending in the United States District Court for the Northern District of Georgia. Leave to intervene was granted on February 16, 1984, and Kasper filed a complaint, claiming that he had been terminated on account of his age in violation of the ADEA, the FNMA Charter Act and Georgia law.

In an order dated December 18, 1984, the District Court dismissed the claims under Georgia law and those under the FNMA Charter Act, finding that no private right of action to remedy allegedly wrongful terminations could be implied under either statute. On May 6, 1986, Kasper's ADEA claim was dismissed. The Court found that the charge of discrimination filed with the EEOC had not been filed within 180 days of the date on which Kasper had been notified of his involuntary retirement as required by 29 U.S.C. Section 626(d)(1). That limitations period was not tolled until the charge was finally filed since

Kasper himself conceded that he had met his 31-year old replacement in the fall of 1982 and he had decided that age was a factor in his discharge in March 1983. As a practicing attorney knowledgeable in discrimination law, Kasper was presumed to be aware of the requirements for compliance with the ADEA, and, as he had not diligently pursued this action after discovering his claims, his EEOC charge was untimely.

On August 3, 1987, in a decision reported at 823 F.2d 451, the Court of Appeals for the Eleventh Circuit affirmed these rulings. A petition for rehearing was denied on October 26, 1987.

REASONS FOR DENYING THE WRIT

At no time in the Courts below did Kasper present the due process, breach of contract and related issues he seeks to raise here, and, for that reason alone, the petition should be denied with respect to those matters. *Brandon v. Holt,* 469 U.S. 464, 473 n.25 (1985); *Duignan v. United States,* 274 U.S. 195, 200 (1927). No exceptional circumstances justify consideration of issues not addressed below, and Kasper cannot be permitted to introduce entirely new, albeit meritless, claims into this action at this stage of the proceeding.

With respect to those questions that may properly be included in the petition, the FNMA Charter Act and ADEA claims, no basis for review on certiorari can be shown. No conflict exists among the courts as to any of the issues raised, and no important questions of law are involved in Kasper's claims. Consideration of implied rights of action in favor of those employed by the government at the time the FNMA Charter Act was enacted would affect virtually no one other than the litigants in this action, and, in

any event, the Courts below properly applied the standards developed by this Court for determining whether a federal statute creates an implicit remedy.

Nor is yet another review by this Court of the commencement of the 180-day period within which a charge of discrimination must be filed with the Equal Employment Opportunity Commission warranted. In both *Delaware State College v. Ricks,* 449 U.S. 250 (1980), and *Chardon v. Fernandez,* 454 U.S. 6 (1981), this Court resolved the very same issue Kasper seeks to raise here, and the Courts below simply adopted the approach approved by this Court in those cases.

Kasper's contention that the 180-day limitations period should be tolled in the unique factual situation presented in this case is of no significance to anyone other than the parties to this action, and such a claim does not merit consideration by this Court. Kasper has not been able to identify any misrepresentation or misconduct which could estop FNMA from relying on the untimeliness of the charge, and no other basis for tolling the limitations period has been cited.

As the petition does not conform with the accuracy, brevity and clearness requirements of Supreme Court Rule 21.5, it should be denied. The petition fails to apprise FNMA adequately of the grounds for seeking certiorari, and the arguments that are comprehensible are meritless.

I. No Private Right Of Action Can Be Implied Under The FNMA Charter Act

In *Cort v. Ash,* 422 U.S. 66, 78 (1975), this Court indicated that the factors to be considered in determining whether to imply a private right of action were:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Of these factors, "the key to the inquiry is the intent of the Legislature." *Middlesex County Sewerage Authority v. National Sea Clammers Assn,* 453 U.S. 1, 13 (1981). "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction . . . [W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15-16 (1979).

The purpose of the FNMA Charter Act was not to provide disgruntled employees with a remedy for adverse personnel decisions, nor was that statute designed for the especial benefit of FNMA employees. Rather, the purposes of the Act, as expressly declared by Congress, were "to establish secondary market facilities for home mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such

facilities to provide" special and supplementary assistance to the secondary market for home mortgages and for financing home mortgages. 12 U.S.C. § 1716.

Only during FNMA's "transitional period" from public agency to privately owned corporation did Congress consider employee protection provisions necessary. In its original form, the statute provided that:

> The Federal National Mortgage Association and the Government National Mortgage Association shall provide by contract for the conditions and methods under which and by which the Federal National Mortgage Association during the transitional period may employ [former GNMA employees] on [the effective date].

FNMA Charter Act, Pub. L. No. 90-448, § 810(d), 82 Stat. 476 (1968). The transitional period during which Congress deemed employee protection appropriate ended on May 21, 1970, pursuant to Section 810(b), and subsection (b) was repealed by Act of Aug. 22, 1974, Pub. L. No. 93-383, § 806(l), 88 Stat. 728. Once the transitional period ended, employee protection was considered unnecessary, and any enforceable rights that Kasper may have had expired at that time.

Thereafter, those FNMA employees hired prior to January 31, 1972, are to be considered government employees for so long as they continue in employment with FNMA only for purposes of "the civil service retirement law," 5 U.S.C. §§8331-8348. They are not performing governmental employment functions, and their selection and appointment are to be made "without regard to federal civil service and classification

laws." Instead, "merit and efficiency" are to be used in hiring and firing decisions. 12 U.S.C. § 1723a(d)(2).

That "merit and efficiency" provision confers no private right of action. *Canfield v. Sullivan,* 774 F.2d 1466 (9th Cir. 1985) (no private right of action exists to enforce "merit principles" to be applied to employees under Intergovernmental Personnel Act); *Howkins v. Caldwell,* 587 F. Supp. 98 (N.D. Ga. 1983), *aff'd without opinion,* 749 F.2d 731 (11th Cir. 1984), *cert. denied,* 471 U.S. 1117 (1985) (same). That provision simply distinguishes the manner in which appointments, promotions and separations were to be made at the newly created FNMA from those at GNMA where "civil service and classification laws" were applicable. 12 U.S.C. § 1723a(d)(1). When viewed in context, that single sentence cannot be characterized as a free-standing grant of private rights entitling an employee to judicial review of all appointments, promotions and separations.

As no private right of action for wrongful termination is expressly set forth in the Act and no indication of any Congressional intent to permit such a claim exists, the decision of the Eleventh Circuit was correct. Accordingly, the petition should be denied.

II. Kasper's EEOC Charge Was Untimely Filed

In *Delaware State College v. Ricks,* 449 U.S. 250 (1980), this Court held that the time period for filing an EEOC charge commences when an employee is notified of the termination decision even if that decision does not become effective until later. While Kasper attempts to distinguish *Ricks* as merely involving an allegedly discriminatory denial of tenure

rather than a termination, that same distinction was rejected in *Chardon v. Fernandez,* 454 U.S. 6 (1981). There, this Court, noting that "the fact of termination is not in itself an illegal act," ruled that the limitations period was triggered at the time that "the operative decision was made—and notice given—in advance of a designated date on which employment terminated." *Id.* at 8.

As Kasper was told that "[his] services [were] no longer required" on July 22, 1982, the 180-day period for filing a charge of discrimination commenced at that time, or, at the very latest, when he received the August 4, 1982 memorandum specifying that he would be retiring on August 5, 1983. The EEOC charge filed more than one year later was therefore untimely.

No basis for tolling that limitations period can be shown by Kasper, and, as the Eleventh Circuit noted, any tolling claim is belied by the fact that Kasper, as an attorney, is presumed to know the significance of limitations periods. *Pruet Production Co. v. Ayles,* 784 F.2d 1275, 1290 (5th Cir. 1986) ("as an attorney, Ayles is charged with knowledge of the law even though he may have had no experience in equal employment law"). Yet even after attending a seminar on age discrimination in March 1983, and becoming convinced that FNMA had somehow discriminated against him, Kasper waited almost six more months before filing his EEOC charge. *Baldwin County Welcome Center v. Brown,* 466 U.S. 147, 151 (1984) ("one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence").

Moreover, even if the 180-day period were tolled for some reason, the Court below found that limita-

tions period would have commenced no later than the fall of 1982, when Kasper met his 31-year old replacement. By failing to act until nearly a year after he had all of the information upon which his claim was based, Kasper could not use tolling to cure the untimeliness of his charge.

As his EEOC charge was time-barred, Kasper's ADEA action was properly dismissed. The petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JEFFERSON D. KIRBY, III
Counsel of Record
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for Federal National Mortgage Association